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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

U.S. METROLINE SERVICES, INC.

Petitioner,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Questions Presented

(1) Whether the Circuit Court properly held that the issue of the Respondent's immunity from the antitrust laws had already been decided in favor of Respondent in a prior appeal dealing with an injunction and that it was therefore the "law of the case" in a subsequent appeal dealing with a motion to dismiss.

(2) Whether the threat made by a regulated private telephone company to cut off the local telephone lines essential for a customer to provide metro service in competition with the telephone company's metro service is conduct immune from injunctive relief under the antitrust laws according a proper application of the two-pronged test in *California Retail Dealers Assn. v. Midcal Aluminum, Inc.*, to the Texas Public Utility Regulatory Act.

(3) Whether (A) the relevant market concept in *Cantor v. Detroit Edison Co.* applies, and (B) the filed tariff doctrine does not apply, to a private telephone company's challenged conduct in a competitive market so that the conduct is not shielded from antitrust liability by the telephone company including its activity in a competitive market in a tariff it claims to be filed with the State regulatory agency.

PARTIES TO THE PROCEEDINGS

The two parties are Petitioner, a corporation, and Respondent, a corporation, as named in the Caption.

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PETITION FOR WRIT OF CERTIORARI

U. S. Metroline Services, Inc. respectfully petitions that a writ of certiorari be issued to review an opinion and judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW AND GROUNDS OF JURISDICTION

The Per Curiam opinion of the United States Court of Appeals for the Fifth Circuit, entered October 23, 1991, is reprinted as Section A of the separate Appendix at pages 1a-4a. The Memorandum Order of the Northern District of Texas, Dallas Division, was entered on February 27, 1991, and is reprinted as Section B of the separate Appendix at pages 1b-4b.

The Per Curiam Opinion of the United States Court of Appeals for the Fifth Circuit, entered May 29, 1990 and reported at 901 F.2d 1267, is reprinted as Section C of the separate Appendix at pages 1c-3c. The Order of that Court denying Petitioner's Motion for Rehearing (timely filed on June 12, 1990) was entered on July 3, 1990 and is reprinted as Section D of the separate Appendix at page 1d. The Memorandum Order of the United States District Court for the Northern District of Texas, Dallas Division, was entered on August 30, 1989 and is reprinted as Section E of the separate Appendix at pages 1e-10e.

The jurisdiction of this Court is invoked under 28 USCS § 1254(1).

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS INVOLVED

The U.S. Constitution, Art. VI, cl. 2; the relevant sections of the Sherman and Clayton Antitrust Acts, 15 USCS §§ 2, 15(a) and 26; the entire Texas Public Utility Regulatory Act, as amended, Art. 1446(c), Tex. Rev. Civ. Stat. Ann. (the "PURA"), together with legislative intent, are printed verbatim as, respectively, Sections F, p. 1f (Constitution); Section G, pp. 1g-2g (Sherman Act); and Section H, pp. 55h-104h [pages are numbered as they appear in the official statute book] (the PURA).

STATEMENT OF THE CASE

In metropolitan areas such as Dallas-Ft. Worth, composed of two or more cities, many businesses sell their products or services throughout the metropolitan area, treating it as one single market, and having a need for frequent calling throughout the metropolitan area, without paying long distance charges. That need is met by a communications service commonly known as "metro service," a service which is neither local telephone service nor long distance telephone service, but is in a third category of those varied communications services provided by several private communications companies. Petitioner is a small communications company which has been providing metro service in the Dallas-Ft. Worth metropolitan area for four years, since early 1988. Petitioner is one of several companies which also provide metro services, competing directly with each other and with metro service provided by Respondent Southwestern Bell. In addition, the Respondent is a monopoly local telephone company and therefore is the sole provider of the local telephone lines essential for one part of the operation of the metro services of all the competitors.

In June, 1989 Respondent Southwestern Bell threatened to cut off all of the Petitioner's inbound and outbound local telephone lines which it had been leasing from Respondent for one and one half years. That action, if taken, would immediately terminate the Plaintiff's business. Respondent's employee Iven testified,

corroborated by the testimony of two other witnesses (R at Tab 19, Plaintiff's Appendix of Relevant Facts, Vol. IV), that the reason for Respondent's threat to terminate the Petitioner's telephone lines was because Petitioner was taking some metro service customers away from Respondent.

Respondent claimed that cutting off the Petitioner's local telephone lines was justified by its "resale prohibition" tariff which it had filed with the Public Utility Commission of Texas (PUC) in connection with the regulation of Respondent's monopoly local telephone service.

Petitioner filed suit in the federal district court, seeking injunctive relief, and alternative damages, under the antitrust laws.[1] The District Court refused to conduct an evidentiary hearing on Petitioner's application for preliminary injunction, instructing the parties to conduct discovery of documents and by depositions and then file briefs supported by excerpts of the discovery evidence. The parties did so. The District Court did not refer to the Record, reciting only claims from the briefs in its Memorandum Order. There is no evidence in the Record of any verified tariffs or of any PUC actions, proceedings or orders approving or reviewing tariffs or the above challenged conduct of Respondent, nor is there any evidence in the Record of any approved rates, rate-making proceedings or orders of the PUC. The evidence showed Petitioner was operating profitably; but that communications customers will leave a communications provider like Petitioner, and not return, if its communications service is interrupted or terminated.

In its August 30, 1989 Memorandum Order (Appendix, Section E), the District Court denied a preliminary injunction, holding that Petitioner could not show the necessary injunctive element of probable success on the merits because the "challenged conduct" was the setting of rates by the PUC and, therefore, the

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[1]The District Court has jurisdiction pursuant to 28 USCS § 1331, 15 USCS § 15 and, because Petitioner and Respondent are citizens of different States, 28 USCS § 1332(a)(1).

two-pronged test of this Court's *Midcal* decision was satisfied by the Texas PURA. (Appendix, Section E, pp. 5e-7e). There was no evidence in the Record of any PUC rate settings or rate orders.

The court also held that Petitioner could not show irreparable injury because being put out of business, due to termination of a contract at will, could be compensated in money damages. There was no evidence in the Record of any contract at will.

The Circuit Court's *per curiam* opinion affirmed the District Court, holding that the case involved "private state-regulated ratemaking" and, since Respondent clearly meets the *Midcal* tests, "there is no likelihood of success on the merits." (Appendix, Section C, p. 3c at fn. 6). However, the Court also rejected Respondent's argument that the PUC had exclusive original jurisdiction over the "private state-regulated ratemaking" because the complaint alleged an antitrust violation within federal jurisdiction, and "Whether Bell is thus immunized is a federal question to be litigated in federal court." (*Id.*, p. 1c) There was no explanation of these contradictions. The Circuit Court also held that there was no irreparable injury since, if injunctive relief was not granted, the lost goodwill of a terminated business, which had operated over the short period of time of a year and a half, could be compensated with damages at the trial on the merits. (*Id.*, p. 3c). Petitioner's motion for rehearing and suggestion for rehearing en banc were denied on July 3, 1990. (Appendix, Section D). Petitioner subsequently filed with this Court on September 28, 1990, a Petition For Writ of Certiorari, which was denied.

Petitioner then filed a petition in federal court against Respondent for money damages. Subsequently, the trial court granted Defendant's motion to dismiss under Federal Rule 12(b)(6) in its February 27, 1991 Memorandum Order and Final Judgment (R 58 and 59), relying upon its conclusions in its earlier August 30, 1989 Memorandum Order.

The Circuit Court affirmed the District Court's opinion, holding that, in the prior injunction appeal, it had decided the issue of Respondent's immunity from antitrust liability under the

state action doctrine. The Circuit Court held that it already had established the "law of the case." (Appendix, Section A, p. 3a).

REASONS FOR GRANTING THE WRIT

The Circuit Court's use of "the law of the case" to affirm a Rule 12(b)(6) motion to dismiss is in conflict with the decisions of this Court, that Court and other Circuit Courts.

Moreover, the Circuit Court ignored the seriousness of its incursion on the antitrust laws.

After almost 100 years of pervasive and unlawful monopoly conditions in the nation's telecommunications industry—the largest single industry in the United States—the federal courts and the FCC have spent the past 22 years establishing and implementing a national policy which protects and encourages competition in that immense and expanding industry. The decision of the court below, however, undermines that policy and, at the same time, rejects this Court's standards for applying the *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307 (1943), state action exemption from the antitrust laws.

In what is admittedly a small injunction suit by a very small communications company, the courts below nevertheless granted a broad immunity from the antitrust laws to Respondent Southwestern Bell, one of the major forces in the national and international telecommunications and information technology industries.

The magnitude of the immunity wrongfully granted can be measured in part by the magnitude of the Respondent and the scope of its operations in both regulated and competitive arenas.

According to its Annual Report for 1989, Southwestern Bell's assets were $21.2 billion, generating revenues for the year of $8.7 billion and net income of $1 billion. Southwestern Bell's assets are greater than the assets of Westinghouse, Tenneco, Proctor & Gamble, Pepsico, Boeing, Phillips Petroleum, Anheuser-Busch, Monsanto, Goodyear, Coca-Cola or any of a number of other national and multi-national conglomerates. Some of Southwestern

Bell's business operations are conducted by its affiliate corporations, fellow members of the Southwestern Bell "family" engaged in a myriad of businesses on regional, national and international scales. [See the financial and organizational charts at Section I, Appendix].

From the late 1870s to the late 1960s, the entire telecommunications infrastructure was dominated by one company, AT&T and its 22 Bell Operating Companies (*e.g.*, Chesapeake and Potomac Bell, New Jersey Bell, Southwestern Bell) which comprised a unified Bell Telephone System, nationwide.

In 1968, however, the FCC's *Carterfone* decision[2] opened up the telephone equipment markets to free competition. In 1970, the FCC's *MCI* and subsequent *Specialized Carriers*[3] decisions opened up the long distance telephone markets to competition. Providing appropriate injunctive relief and necessary appellate decisions, the federal courts stepped up the enforcement of both FCC Orders and the antitrust laws to provide the necessary legal policy and framework for the growth of competition in telecommunications.[4] The Legislature in Texas also did its part by enacting a modern statute, the PURA.

Passed in 1975, and amended on several occasions since, the Texas PURA is a unique utility regulatory statute, for it announced new policies and provided new tools to accommodate

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[2]*Carterfone v. AT&T*, 13 F.C.C. 2d 420 (1968).

[3]*Microwave Communications, Inc.*, 18 F.C.C. 2d 953 (1969); *Specialized Common Carrier Services*, 29 F.C.C. 2d 870 (1971), *aff'd sub. nom. Washington Utilities & Transportation Comm'n v. FCC*, 513 F.2d 1142 (9th Cir. 1975), *cert. denied*, 423 U.S. 836 (1975).

[4]*E.g.*, *North Carolina Utilities Commission v. FCC*, 552 F.2d 1036 (4th Cir. 1977); *United States v. American Telephone & Telegraph Co.*, 552 F.Supp. 131 (D.D.C. 1982), *aff'd*, 460 U.S. 1001, 103 S.Ct. 1240 (1983); *MCI Communications Corp. v. American Telephone & Telegraph Co.*, 708 F.2d 1081 (7th Cir. 1983) *cert. denied*, 464 U.S. 891, 104 S.Ct. 234 (1983). There are a host of other federal decisions in this area, throughout the 1970s and 1980s.

(i) necessary regulation of dominant utilities operating in a monopoly market, on the one hand, with (ii) protections and encouragement of competitive businesses and markets, on the other hand. As the telecommunications industry has rapidly evolved toward competitive markets, the Texas PURA also has evolved, from 1975 through the 1989 session of the Legislature, to mirror the important developments in federal policy. [The text of the PURA is in Section H, Appendix].

1. **The Circuit Court's holding that its decision in a prior appeal of the denial of a preliminary injunction regarding Southwestern Bell's immunity from antitrust liability is "the law of the case" in a subsequent appeal from the granting of a Rule 12(b)(6) motion to dismiss is clearly erroneous and works a manifest injustice on the Petitioner.**

Ordinarily, affirmative defenses such as immunity may not be raised by a motion to dismiss. *Scott v. Kuhlmann*, 746 F.2d 1377 (9th Cir. 1984). Both the trial court and the Circuit Court failed to recognize that, under virtually all factual scenarios, Respondent is not immune from antitrust liability. Whether Respondent even can plead or prevail on a defense of immunity necessarily involves law and fact issues that should be decided on the merits. *Liffiton v. Keuker*, 850 F.2d 73 (2nd Cir. 1988).

In its *per curiam* opinion in the first appeal dealing only with the denial of injunctive relief, the Circuit Court necessarily focused upon the issue on appeal—namely, whether the Plaintiff had established the prerequisites for preliminary injunctive relief. The Circuit Court's *holding* was that Plaintiff had failed to show *irreparable injury* (which was the subject of the bulk of the oral argument before the Panel on April 3, 1990). Whether as an afterthought, a comment or otherwise—but clearly only dictum—Footnote 6 of the Court's *per curiam* opinion did not become the "law of the case." *Milgard Tempering, Inc. v. Selas Corp. of America*, 902 F.2d 703 (9th Cir. 1990).

By characterizing its decision disposing of the motion for preliminary injunctive relief as the law of the case to a substantive

issue, the Court of Appeals committed clear error. The Circuit Court disregarded the important difference between the tests applicable to a preliminary injunction and the strict test to uphold the granting of a Rule 12(b)(6) motion to dismiss. The district court's grant of the Rule 12(b)(6) motion meant that it necessarily ruled as a matter of law that "it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-56 (1957). This test is far different from the element of "the likelihood of success on the merits," which a plaintiff must establish in order to obtain injunctive relief. *Mississippi Power & Light Co. v. United Gas Pipeline Co.*, 760 F.2d 618, 621 (5th Cir. 1985).

It is error to apply a holding in a preliminary injunction as the law of the case in a subsequent trial (or disposition) on the merits. An argument that a determination made at a preliminary injunction hearing is the law of the case in a subsequent hearing on a motion to dismiss, for example, ignores the difference in tests applicable to a preliminary injunction and a Rule 12(b)(6) motion to dismiss. *Kennedy v. City of Cleveland*, 797 F.2d 297 (6th Cir. 1986), *cert. den'd*, 479 U.S. 1103.

It is clear that the denial of extraordinary relief for lack of a clear and strong showing on the merits, or for a showing that is only preliminary or tentative in nature, does not trigger law of the case consequences.

> "The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held."
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> "Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." *University of Texas v. Camenisch*, 451 U.S. 390, 395, 101 S.Ct. 1830, 1834, 68 L.Ed.2d 175, 180 (1981).

> "Refusal to stay a preliminary injunction pending appeal does not establish the law of the case since it rests on nothing more than a tentative appraisal of the probable result on the merits." *Bd. of Trade v. Commodity Futures Trading Comm'n.*, 605 F.2d 1016, 1020 (7th Cir. 1979), *cert. denied*, 446 U.S. 928, 100 S.Ct. 1866, 64 L.Ed.2d 281 (1980). *See, City of Angoon v. Hodel*, 803 F.2d 1016, 1024 n. 4 (9th Cir. 1986) [determinations made regarding a preliminary injunction do not constitute the law of the case], *cert. denied*, 484 U.S. 870, 108 S.Ct. 197, 98 L.Ed. 2d 148 (1987); *Sierra Club v. U. S. Army Corp of Engineers*, 771 F.2d 409, 413 (8th Cir. 1985) [same].

The Circuit Court's holding clearly is in conflict with the referenced decisions of the Third, Sixth, Seventh, Eighth, Ninth and D.C. Circuits, and particularly with this Court's holding in *University of Texas v. Camenisch, supra.*

Even the Fifth Circuit Court's reliance upon its opinion in *Knotts v. U.S.*, 893 F.2d 758, 761 (5th Cir. 1990)—that an appellate court decision rendered at one stage of a case constitutes the "law of the case" in all succeeding stages—is misplaced. The Court actually stated in *Knotts* that:

> "The scope of the doctrine, however, is limited: it 'applies only to issues that were decided in the former proceeding and does not pertain [to] questions that might have been decided but were not.'" *Id.*, 893 F.2d at 761.

2. The decision below endangers national policies protecting and encouraging competition in telecommunications by immunizing from the antitrust laws a major force in that industry, Respondent, in contradiction to decisions of this Court on the state action doctrine, if applied or when applied to the Texas PURA.

From the beginning, PURA § 89 has directed that the "Act shall be construed to apply so as not to conflict with any authority of the United States." That is consistent with the federal divestiture court's application of the Supremacy Clause to hold

that the court's enforcement of the Sherman Act was not subject to the permission or approval of state utility regulatory commissions.[5]

From the Act's inception, § 47 of PURA has provided:

> "No public utility may discriminate against any person or corporation that sells or leases equipment or performs services in competition with the public utility, nor may any public utility engage in any other practice that tends to restrict or impair such competition."

Indeed, in the purpose clause of the PURA, at § 2, the Legislature made it clear that the preferred "normal forces of competition" do not operate in the areas served by monopoly utility companies; and, to attempt to emulate competitive forces "which operate to regulate prices in a free enterprise society," the Act's purpose is to establish a regulatory system to regulate public utilities in those monopoly areas. Subsequent amendments and court and PUC interpretations of PURA established that the regulatory function of the PUC is to be adjusted and modified *as competition develops* in the varied telecommunications markets, *i.e.*, the PUC's regulatory power is to bear only upon the operations of public utilities in *monopoly* markets.[6]

PURA Sections 3(c)(2); 18(a), (c), (e), (f), (g), (h), (k), (l), (m), (n), (o), (p), (q) and (r); 45; and 100, when read with §§ 2, 47 and 89 already discussed, represent an overriding legislative policy aimed at accomplishing two parallel goals:

> (1) To protect consumers from excessive prices (prices not based on costs) and poor or discriminatory services from

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[5] *United States v. American Tel & Tel. Co., supra*, 552 F.Supp. at 157-159.

[6] As the PUC said in 1984: "The Commission is of the opinion that where new technologies arise which can thrive only in an unregulated environment, *then regulation should give way* to technology rather than vice-versa . . . . Simply put, the age of technology and competition is upon us and regulation should acknowledge this fact." *Texas PUC Docket 5827, Final Order*, November 21, 1984, *aff'd, Southwestern Bell Telephone Co. v. PUC of Texas*, 735 S.W.2d 663 (Tex.App.—Austin 1987, no writ). (emphasis added.)

telecommunications utilities dominant in a market, *i.e.*, a monopoly market such as local telephone service; and

(2) To permit existing communications companies and "new telecommunications enterprises" to compete openly and fairly in competitive markets--to provide ". . . equal opportunity to all telecommunications utilities [both regulated, dominant companies like Respondent and non-dominant communications companies like Petitioner] in a competitive marketplace." PURA § 18(a).

The Texas Supreme Court expressly held that sections 45 and 47 of the PURA "apply to only the public utility itself and not to the Commission." *Public Utility Commission of Texas v. AT&T Communications, Inc.*, 777 S.W.2d 363, 367 (Tex. 1989). Clearly, the policy of the State is to protect competitors, and competitors as customers of a public utility, from both discriminatory and anti-competitive conduct of a public utility.

Section 18(a) of PURA is an amendment stating the Legislature's intention to further strengthen policies to encourage competition in telecommunications; expressly recognizing the impacts of both technology and "federal, judicial and administrative actions"; and finding that the telecommunications industry "has become and will continue to be in many and growing areas a competitive industry which does not lend itself to traditional public utility regulatory rules, policies and principles."

At the same time, the Legislature delineated between "dominant carriers" and other, small "non-dominant" competitors in the telecommunications industry, by amending the definition of "public utility" in Section 3(c)(2) of the Act. By that amendment, the Legislature provided for the continued regulation of dominant carriers [any company: (i) providing a communications service and which ". . . has sufficient market power in a telecommunications market . . . to enable such [company] to *control prices in a manner adverse to the public interest* for such service in such market."; or (ii) providing "*local exchange telephone service*." PURA § 3(c)(2)(B) [emphasis added]. That

same section expresses the intent *not* to regulate [except for reporting requirements] other, non-dominant providers of, broadly, "communications services."

Additionally, Sections 18(e) and (g), amendments added by the Legislature in 1987, direct the PUC to make rules and establish procedures which are: "*applicable to local exchange companies for determining the level of competition in specific telecommunications markets and submarkets . . .*" and which "*. . . balance* the public interest in a *technologically advanced telecommunications system providing a wide range of new and innovative services . . . prohibiting anticompetitive practices, and preventing the subsidization of competitive services with revenues from regulated monopoly services.*" PURA §§ 18(e) and (g) (Excerpts and emphasis added).

Thus, the Texas Legislature, in four different sessions of the Legislature from 1975 through 1987, adopted and amended the PURA in a manner to clearly articulate a pervasive and expanding policy promoting both the development and the protection of competition in telecommunications. A reading of the PURA as a whole establishes that the Legislature sought to achieve two policies:

(1) The regulation of monopoly utilities only to the extent necessary to protect the public; and

(2) The fostering of competition in telecommunications to the greatest extent possible, in those various areas and activities where the public can benefit from higher technology and innovative communications services at lower prices - the very hallmarks of the competitive marketplace. Those policies were discussed by the Texas Court of Appeals in *Amtel Communications, Inc. v. PUC*, 687 S.W.2d 95 (Tex. App 3 Dist. 1985):

> "First, PURA requires that the Commission implement a public policy that *monopoly power* of a public utility shall be held only under State license and *exercised under State regulatory control.* The statute requires, *concurrently*, that the agency implement a contrary *public policy in favor of*

> *competition.* Second, the Commission must under PURA implement a public policy against discrimination in utility services while, in some instances and in some degree, the agency may implement a policy of discrimination based upon the public interest." 687 S.W.2d at 99 (emphasis added).

First, the court construed the PURA as a statement of state policy to the effect that a monopoly public utility can *exercise* its monopoly power *only under State regulatory control*, that is, a monopoly utility is *not to act as a monopoly* except under the *regulatory* control of the Texas PUC. Then the Court construed the PURA as establishing a "concurrent" public policy favoring and protecting competition in the telecommunications industry. That latter policy of the State has been emphasized and expanded in the 1985 and 1987 amendments of PURA, *supra.*

After analyzing the sections of the PURA dealing with the regulation of the *proper exercise* of monopoly power by a utility, the *Amtel* court then stated:

> "On the other hand, PURA contains other provisions that are distinctly "antitrust" in nature and reflect a definite public policy *in favor of competition* as a regulating or controlling force applicable to public utilities. In these particular instances, it is plain that the *PURA does not insulate a public utility from the forces of competition and, indeed, prohibits anticompetitive practices by the utility.* [citing, Section 18(a) and Section 47 of the Act]." 687 S.W.2d at 100 (emphasis in original and added).

Yet, the court below did exactly the reverse by deciding to "insulate a public utility from the forces of competition" and by immunizing "anticompetitive practices by the utility."

In the modern, high-technology telecommunications industry, there are few monopoly markets left - the major one being the provision of ordinary local telephone service in a town or city by a regulated telephone company under a state statute and a municipal franchise. Because the local telephone companies have monopolies, they are "dominant carriers" and their monopoly services are regulated by the Texas PUC. In contrast, there are a

large number of competitive markets in which there are a growing number of competitive providers of a large variety of telecommunications services - cellular mobile telephone services; paging ("beeper") services; providers of complete telephone systems and services shared by all of the tenants of the new "smart" office buildings; fiber optic carriers; miscellaneous common carriers; private system carriers; and metro services companies, among others.

Respondent's local telephone lines are the only telephone lines which *all* competing service companies [*e.g.*, long distance companies, paging companies, mobile telephone companies and metro service companies] must use; they are "bottleneck" facilities.

This Court held in *Otter Tail Power Company v. United States*, 410 U.S. 366, 93 S.Ct. 1022 (1973), that Otter Tail Power Company must allow municipalities access to its existing transmission lines so that the municipalities could construct their own electrical systems. Thus, this Court held that Otter Tail could not use its monopoly power to foreclose the competition of the municipal electrical systems. That decision articulated what has come to be known as the "essential facilities doctrine," namely, that a business which controls a facility that cannot reasonably be duplicated and to which access is necessary in order for others to compete, has an obligation to provide its competitors with access to the facility. When applied to the case here, *Otter Tail* mandates that the Petitioner be allowed access to Respondent's telephone lines. *See also MCI Communications Corporation v. American Telephone and Telegraph Company*, 708 F.2d 1081 (7th Cir. 1983), *cert. denied*, 104 S.Ct. 234 (1983).

In reviewing the applicability of the state action immunity to a state statute allowing a liquor price fixing system, this Court first noted a threshold question before proceeding to apply to either prong of the *Midcal* test.

> "The 'threshold question,' in this case as in *Midcal*, is whether the State's pricing system is inconsistent with the antitrust laws." *324 Liquor Corp v. Duffy*, 479 U.S. 335, 341 (1987), citing *Midcal, infra*, footnote 7, 445 U.S. at 102.

Here, the Texas PURA is *not* inconsistent with the antitrust laws of the United States, and the court below should have gone no further in its attempt to apply *Midcal* to this case.

Nevertheless, had the court below proceeded to analyze the PURA, it should have readily concluded that the PURA meets neither the first nor the second prongs of the *Midcal* test.[7]

The text of the *per curiam* opinion below is devoid of any suggestion that the court analyzed either the expressed or implied policies of the State of Texas, in the PURA or in the cited court and agency case decisions interpreting the Act.[8]

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[7]For the first prong, a court must find that the anticompetitive conduct complained of, the "challenged restraint," must be conduct which is "clearly articulated and affirmatively expressed as state policy." *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97 at 105 (1980).

For the second prong, a court must find that the State exercises "...ultimate control over the challenged anticompetitive conduct...that State officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with State policy. Absent such a program of supervision, there is no realistic assurance that a private party's anticompetitive conduct promotes State policy, rather than merely the party's individual interests." *Patrick v. Burget*, 108 S.Ct. 1658, 1663 (1988).

[8]Both courts below substantially departed from accepted judicial proceedings by ignoring the Record after refusing an evidentiary hearing and then relying largely on the briefs of Respondent to present mere conclusions and arguments as the contradictory and erroneous "facts" appearing in the Opinion (*e.g.*, Section I and fns. 3, 4 and 5, Appendix, Section C, p. 1c). The "clearly erroneous" test on appeal does not apply here and Petitioner was entitled to a full review of the Record on appeal. *See, Mayo v. Lakeland Highlands Canning Co.*, 309 U.S. 310, 60 S.Ct. 517 (1940); *Marcum v. United States*, 621 F.2d 142, 144-45 (5th Cir. 1980); *Daniel v. Washington County Board of Education*, 488 F.2d 82 (5th Cir. 1973).

Selectively reciting only the *rate-making* sections of PURA, as the district court did (Appendix, Section E, pp. 5e-7e) entirely ignores the policies favoring competition which led the Texas Supreme Court to conclude that "the PURA does *not* insulate a public utility from the forces of competition." *Amtel, supra*, p. 11-12.

The courts below cannot point to any policy of the State which remotely suggests that Respondent's threat to put Petitioner out of business is the kind of "challenged restraint" on competition which is "clearly articulated and affirmatively expressed as state policy." *Midcal, supra*, footnote 7.

Moreover, both courts below wrongly relied upon *Southern Motor Carriers Rate Conference v. United States*, 105 S.Ct. 1721 (1985), for this Court was dealing there with "an anticompetitive regulatory system" which permitted large "rate bureaus" of motor carriers to collectively engage in price-fixing agreements. In discussing its decisions in *Midcal*, this Court stated that the first prong of the *Midcal* test is satisfied:

> "As long as the State as sovereign *clearly intends to displace competition in a particular field with a regulatory structure* . . ." *Id.*, 105 S.Ct. at 1731 (emphasis added).

Neither court below demonstrated that it found in the PURA, the court and agency interpretations or the circumstances surrounding Respondent's conduct any clear intention by Texas to "displace competition" in the telecommunications field in general or in the competitive metro services market in particular.

As for the second prong of the *Midcal* test, there is nothing in either the PURA or the Record which suggests that Texas or the PUC actively supervises any policy permitting Respondent's conduct.

Obviously, the PUC's supervision of a monopoly public utility's rates in public hearings is far removed from that kind of active review and approval or disapproval of a private party's challenged anticompetitive conduct this Court spoke of in *Patrick v. Burget, supra*, footnote 7.

The court below entirely ignored the most recent opinions of this Court applying the second prong of the *Midcal* test—*Hallie v. Eau Claire*, 471 U.S. 34, 47, 105 S.Ct. 1713 (1985) and *Patrick v. Burget*, 108 S.Ct. 1658, 1663 (1988). In *Patrick*, quoting from *Hallie*, this Court clearly articulated the standard to be applied to the "active supervision" requirement of *Midcal*:

> "The active supervision requirement stems from the recognition that "*[w]here a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State.*" *Hallie v. Eau Claire*, 471 U.S. 34, 47, 105 S.Ct. 1713, 1720, 85 L.Ed. 2d 24 (1985); *See Id.*, 45, 105 S.Ct., at 1719-1720 ("*a private party . . . may be presumed to be acting primarily on his or its own behalf*"). The requirement is designed to ensure that the state action doctrine will shelter *only* the *particular* anticompetitive acts of private parties that, in the judgment of the State, *actually furthers state regulatory policies. Id.*, at 46-47, 105 S.Ct. at 1720. To accomplish this purpose, the active supervision requirement mandates that the State exercise ultimate control over the challenged anticompetitive conduct . . . . The active supervision prong of the *Midcal* test requires that State officials *have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with State policy. Absent such a program of supervision, there is no realistic assurance that a private party's anticompetitive conduct promotes State policy, rather than merely the party's individual interests.*" 108 S.Ct. at 1663 (emphasis added).

The Respondent and the court below did not address how it is that Respondent's threatened conduct [cutting off the Plaintiff's telephone wires and unilaterally interpreting and applying its own tariff to justify the disconnection] furthers any governmental interest of the State of Texas in any "clearly articulated and affirmatively-expressed State policy." Nor did the court below address or find that the State of Texas had any mechanism to actually exercise any power to review "particular anticompetitive

acts of private parties and disapprove those that fail to accord with State policy." Neither the Respondent nor the court below cite any acts or policies of the Texas Legislature or any reviews, investigations or proceedings ever initiated by the PUC to review or approve any anticompetitive conduct by Respondent or anyone else; that job has been left to the courts.

3. The decision below conflicts with (A) decisions of this Court in applying the state action doctrine to private anticompetitive conduct in a competitive relevant market separate from a regulated monopoly market, and (B) decisions of other Courts of Appeal rejecting antitrust immunity claimed under the filed tariff doctrine.

A. Regarding the first prong of the *Midcal* test, this Court's decision in *Southern Motor Carriers, supra*, should not have been relied upon for the decision below for another, significant reason—this Court's emphasis on the *relevant market*:

> ". . . in *Cantor* the anticompetitive acts of a private utility were held unprotected because the Michigan Legislature had indicated no intention to displace competition in the relevant market. 421 U.S., at 584-585, 96 S.Ct., at 3114, 3115." *Southern Motor Carriers, supra*, 105 S.Ct. at 1731.

Petitioner submits that this Court's decision in *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 96 S.Ct. 3110 (1976) is controlling here, but ignored by the court below. *Cantor* dealt with a public utility industry—electricity—which is far less subject to either changes in technology or competition than the telecommunications industry. *Cantor* involved one isolated competitive area of the electricity industry, the supplying of light bulbs. The plaintiff-petitioner, a competitive supplier of light bulbs, charged that the effect of Detroit Edison's bulb supply program was to foreclose competition in a substantial segment of a *competitive* market. In *Cantor* this Court considered Detroit Edison's claims which were virtually identical to Respondent's claims below.

This Court said that previous decisions had already decided that state authorization, approval, encouragement or participation in anticompetitive private conduct confers no antitrust immunity. In each of the cases cited by the Court, the initiation and enforcement of the restrictive program under attack involved:

> "... *a mixture of private and public decision-making*. In each case, notwithstanding the State participation in the decision, *the private party exercised sufficient freedom of choice* to enable the Court to conclude that he should be held responsible for the consequences of his decision.
>
> The case before us also discloses a program which is the product of a decision in which both the Respondent [Detroit Edison] and the Commission participated .... Nevertheless, there can be no doubt that the option to have, or not to have, such a program is primarily *Respondent's*, not the Commission's .... There is nothing unjust in a conclusion that Respondent's participation in the decision is sufficiently significant to require that its conduct implementing the decision, like comparable conduct by unregulated businesses, conform to applicable federal law. Accordingly, even though there may be cases in which the State's participation in a decision is so dominant that it would be unfair to hold a private party responsible for his conduct in implementing it, this record discloses no such unfairness." *Id.*, 428 U.S. at 595, 96 S.Ct. at 3119 (emphasis added).

This Court rejected the very argument made by Respondent to, and accepted by, the court below. This Court further stated:

> "First, merely because certain conduct may be subject both to state regulation and to the federal antitrust laws does not necessarily mean that it must satisfy inconsistent standards; second, even assuming inconsistency, we could not accept the view that the federal interest must inevitably be subordinated to the State's. And finally, even if we were to assume that Congress did not intend the antitrust laws to apply to areas of the economy primarily regulated by a State, that assumption would not foreclose the enforcement of the antitrust laws in

an essentially unregulated area such as the market for electric light bulbs." *Id.*, 428 U.S. at 595, 96 S.Ct. at 3120.

The Court acknowledged that there may be some examples of economic regulation in which the very purpose of the government control is to avoid the consequences of competition.

"But all economic regulation does not necessarily suppress competition. On the contrary, public utility regulation typically assumes that the private firm is a natural monopoly and that public controls are necessary to protect the consumer from exploitation. *There is no logical inconsistency between requiring such a firm to meet regulatory criteria insofar as it is exercising its natural monopoly powers and also to comply with antitrust standards to the extent that it engages in business activity in competitive areas of the economy* . . . . The mere possibility of conflict between state regulatory policy and federal antitrust policy is an insufficient basis for implying an exemption from the federal antitrust laws. Congress could hardly have intended state regulatory agencies to have broader power than federal agencies to exempt private conduct from the antitrust laws . . . .

The Court has consistently refused to find that regulation gave rise to an implied exemption without first determining that exemption was necessary in order to make the regulatory Act work, "and even then only to the minimum extent necessary."

The application of that standard to this case inexorably requires rejection of respondent's claim. For Michigan's regulatory scheme does not conflict with federal antitrust policy and, conversely, if the federal antitrust laws should be construed to outlaw respondent's light bulb exchange program, there is no reason to believe that Michigan's regulation of its electric utilities will no longer be able to function effectively. Regardless of the outcome of this case, Michigan's interest in regulating its utility's distribution of electricity will be almost entirely unimpaired.

> We conclude that neither Michigan's approval of the tariff filed by respondent, nor the fact that the lamp-exchange program may not be terminated until a new tariff is filed, is a sufficient basis for implying an exemption from the federal antitrust laws for that program." *Id.*, 428 U.S. at 595-599, 96 S.Ct. at 3120-3121. (emphasis added).

Since the *Cantor* decision in 1976, 33 years after the *Parker* decision in 1943, there has been no decision by this Court or a Circuit Court which contradicts the holdings and the reasoning in *Cantor*.

Using regulated customer tariffs in an unregulated area as an excuse to force out a competitor is private activity in a competitive market, and is unlawful.

By allowing Defendant Bell to write and file its customer rates with the PUC, or by the PUC approving those rates for Bell's customers, the State of Texas did not give Bell immunity for its misconduct towards its competitors, nor did Texas, in any manner, declare that misconduct to be lawful.

B. With respect to the second prong of the *Midcal* test, the court below succumbed to the filed tariff doctrine in its erroneous application of the state action exemption, after wrongly assuming that Respondent's claimed tariff had been filed with and approved by the PUC.

In *Essential Communications v. American Tel. & Tel. Co.*, 610 F.2d 1114 (3rd Cir. 1979), the court presented a brief history of the development of antitrust policy and the growth of competition in the telecommunications industry, including an analysis of the federal Act and the limitations on the filed tariff doctrine. As that court pointed out, the tariff scheme in *both* federal and state regulatory systems is:

> ". . . designed essentially for the *protection of telephone users* in a rather limited way from discrimination in rates or service and from excess charges . . . .
>
> AT&T's primary obligation under the 1934 Act [federal] is to adhere, in its dealings with customers, to its filed tariffs. That

primary obligation is the heart of public utility regulation, because if carriers were free to depart from filed tariffs, the prohibition against discrimination among customers could be evaded. *However, the filed tariff rule has little or nothing to do with AT&T's duties under the antitrust laws toward its competitors* in the equipment supply business; *competitors are not the intended beneficiaries of that rule of public utility regulation.* This distinction was recognized over 50 years ago by Justice Brandeis in the leading case of *Keogh v. Chicago & Northwestern Ry. Co.*, 260 U.S. 156, 43 S.Ct. 47, 67 L.Ed 183 (1922).

In this case the plaintiff is not suing in the capacity of a customer for communications services. Essential seeks recovery for injury to its business or property from actions taken by the defendants in formulating a tariff, and in rendering customer services. The Bell System will not be asked to disgorge to any customers any revenues derived under the filed tariff. Indeed, it can continue to collect those revenues until a new tariff is filed. There is no policy conflict, actual or potential, therefore, between the section 4 Clayton Act remedy and the antidiscrimination purposes of the filed tariff rule." 610 F.2d at 1120-22 (emphasis added).

The court rejected AT&T's claim of implied immunity from the antitrust laws, merely because AT&T's rates and tariffs were filed with or approved by the FCC.

It is well settled that the federal Communications Act of 1934 (which contains *no* section expressly protecting competition as does the Texas Act) provides *no* implied immunity from the antitrust laws. *United States v. R.C.A.*, 358 U.S. 334, 339-46, 79 S.Ct. 457; *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 597 n. 36, 96 S.Ct. 3110 (1976); *MCI Communications Corp. v. AT&T*, 708 F.2d 1081, 1101-05 (7th Cir. 1983), *cert. denied* 104 S.Ct. 785 (1983); *Phonetele, Inc. v. AT&T*, 664 F.2d 716, 726-37 (9th Cir. 1981), *cert. denied*, 459 U.S. 1145, 103 S.Ct. 785 (1983); *Northeastern Telephone Co. v. AT&T*, 651 F.2d 76, 82-84 (2nd Cir. 1981), *cert. denied*, 455 U.S. 943, 102 S.Ct. 1438 (1982);

Mid-Texas Communications Systems v. AT&T, 615 F.2d 1372, 1377-82 (5th Cir. 1980), *cert. denied* 449 U.S. 9112, 101 S.Ct. 286 (1980); *United States v. American Telephone & Telegraph Co.*, 461 F.Supp. 1314, 1321-29 (D.D.C. 1978). *See*, in particular, the language of the court below in *Midland Telecasting Co. v. Midessa Television Co.*, 617 F.2d 1141 (5th Cir. 1980), at pp. 1145-46.

The court in *Essential Communications*, *supra*, then rejected the filed tariff doctrine, reversing the district court's dismissal of the plaintiff's Section 16 injunction action, holding that: ". . . the complaint should not have been dismissed on the ground that the FCC tariffs made the defendants' activities exempt from antitrust scrutiny." 610 F.2d at 1124.

Then, the court also rejected AT&T's claim to immunity under the *Parker v. Brown* "state action" doctrine, based on AT&T's claim that its actions also were permitted by *state tariff filings* (exactly as Petitioner contended below):

> "There are several difficulties with this argument. The first is that the typical state regulatory scheme is essentially no different than that of the 1934 Act. It permits carriers to initiate tariffs, requires them to adhere strictly thereto in dealing with their customers, and permits their revision, in the interest of the customers, by a state regulatory agency. The analysis which we made with respect to any conflict between federal antitrust law and federal utility regulation in Part II is equally applicable here. A second, and we think insurmountable objection, is the holding in *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 96 S.Ct. 3110, 49 L.Ed. 2d 1141 (1976) *that the provisions of utility initiated tariff filings do not furnish a predicate for* a *Parker v. Brown exemption from antitrust claims by competitors* injured as a result of compliance with the tariffs. The court's analysis in *Cantor* is entirely consistent with that which we made in Part II [the implied immunity issue above]. . .

> We hold only that neither the FCC nor the state tariff regulatory schemes provide a basis for an implied exemption from those laws." *Id.* at 1125-26 (emphasis added).

In *City of Kirkwood v. Union Electric Co.*, 671 F.2d 1173 (8th Cir. 1982), the court also rejected the filed rate doctrine in a price-squeeze antitrust claim against a regulated electric utility company, even though the electric company was subject to pervasive regulatory schemes of both federal (Federal Energy Regulatory Commission) and state (Missouri Public Service Commission) regulatory agencies, and even though the price squeeze complained of by the plaintiff *arose from the federal and state rate-making tariffs* filed by the electric company. The court pointed out that an award of antitrust damages for a price squeeze would not conflict with the filed-rate rule's purpose,

> ". . . which is to ensure rate uniformity by confining the authority to oversee the reasonableness of rates to a single regulatory agency. See *Arkla*, 101 S.Ct. at 2930 [*Arkansas Louisiana Gas Co. v. Hall* (Arkla), 453 U.S. 571, 101 S.Ct. 2925 (1981)]. . . . *The filed-rate doctrine does not preclude antitrust liability in the case at bar. An award of antitrust damages for a price squeeze would not conflict with the doctrine's purpose . . . . In contrast, Kirkwood does not quarrel with the reasonableness determinations of the FERC and PSC* as to any individual wholesale or retail rate. *Instead, Kirkwood complains of anti-competitive effects resulting from the interaction of rates which, taken separately, may be reasonable . . . .*
>
> Another consideration bolsters our conclusion that the filed-rate doctrine does not apply. The Third Circuit noted in *Essential Communications Systems, Inc v. American Tel. & Tel. Co.*, 610 F.2d 1114, 1121 (3rd Cir. 1979) that the doctrine was created to protect customers, not competitors . . . . Kirkwood alleges that it has been injured as a competitor, not as a customer, though it stands in both relations to UE (the defendant electric company). *A rule formulated to ensure uniformity of rates as between customers*

should not give an unfair advantage to a utility in its dealings with competitors." *Id.* at 1179 (emphasis added).

The foregoing analysis directly applies to this case.

CONCLUSION

The decision below conflicts with decisions of this Court and other Circuit Courts on important federal questions and conflicts with decisions of Courts of Appeals themselves on the same issues. Both courts below departed so far from the accepted and usual course of judicial proceedings that this Court's power of supervision should be exercised. For the reasons stated in this Petition, Petitioner respectfully prays that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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